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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-395

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Petitioner,

vs.

ROSE M. SALAZAR,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

San Francisco Bay Area Rapid Transit District petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered July 1, 1976.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is set forth as Appendix A. The May 19, 1975 order of the district court, not reported, is set forth as Appendix B.

JURISDICTION

The opinion of the court of appeals was rendered July 1, 1976. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *en Banc* which was denied on August 17, 1976. Appendix C. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Rule 4(a) of the Federal Rules of Appellate Procedure allows the filing of a notice of appeal for 30 days after entry of judgment. The district court may extend the period for up to 30 more days upon a showing of excusable neglect. The showing of excusable neglect must be made on noticed motion if the extension is sought after the first 30 days have expired.

The question presented is whether the district court has jurisdiction to extend the time for filing a notice of appeal when the required motion is not made until more than 60 days after entry of judgment.

RULE INVOLVED

Rule 4(a) of the Federal Rules of Appellate Procedure is set forth in Appendix D.

STATEMENT OF THE CASE

Plaintiff commenced this action against Petitioner, her former employer, under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e). On January 24, 1975, after trial, judgment was entered against the plaintiff. Plaintiff neglected to file the notice of appeal from that judgment until March 21, 1975, fifty-six days after its entry.

On May 1, 1975, ninety-seven days after entry of judgment, plaintiff filed her motion, as required by F.R.A.P. 4(a), to extend the time to file the notice of appeal.

The district court denied the motion, ruling that it was precluded from extending the time because the motion for the extension was not timely filed (Appendix B). The district court's order further stated that plaintiff's delay in filing was due to economic hardship and, on that basis only, there is sufficient ground for a finding of excusable neglect.

Plaintiff appealed from the district court's order denying the motion for an extension, and the court of appeals reversed the district court, holding that there was jurisdiction to allow the motion.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with a decision of the Court of Appeals for the Eighth Circuit. The question presented has not been decided by this Court, and, as determined by the court below, has a significant adverse impact on the finality of judgments and the burdens on the federal court system.

The decision of the court of appeals in this case, and its earlier decision in *Karstetter v. Cardwell,* 526 F.2d 1144 (9th Cir. 1975), are squarely in conflict with the holding in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach,* 525 F.2d 1179 (8th Cir. 1975). The Court of Appeals for the Eighth Circuit held that, notwithstanding the filing of a notice of appeal in the second thirty-day period, the motion for the extension must be made within the second thirty-day period.

The holding of the Court of Appeals for the Eighth Circuit is correct and supported by both a common-sense reading of the rule and an examination of the ramifications of the interpretation of the court below.

While the rule does not literally require the motion to be filed within the second thirty-day period, it does require that a request for an extension, if made after expiration of the first thirty-day period, be "made by motion with such notice" as is deemed appropriate. Read with the prohibition against an extension for more than 30 days, the proper construction is that both the motion and the notice must be filed within the second thirty-day period.

The expansive rule adopted in this case attributes significance to the late filed notice of appeal. However, no rule permitted its filing, and the notice itself does not comply with the requirements for a motion. Rule 7(b)(1) of the Federal Rules of Civil Procedure. In effect, Rule 4(a) is being rewritten to permit a 60 day period for filing a notice of appeal followed by an indefinite period to move to "validate" the late notice.

The effect of such a procedure was well stated in *Files v. City of Rockford,* 440 F.2d 811, 816 (7th Cir. 1971):

> "If the court were to assume jurisdiction here on the basis of the record before us, we would in effect be amending Rule 4(a), Fed. R. App.P., so as to provide an automatic sixty day period within which to file the notice of appeal. This is not our province nor indeed is it our ability to do so.
>
> *"Casting this substantial doubt of the finality of judgments would increase the burdens of an already overloaded federal judiciary.* 9 Moore's, *supra,* ¶ 204.13 [2], at 978." [Emphasis supplied].

A judgment should become final at some easily determinable time. All jurisdictions attempt to set a limit on the time for filing an appeal. In contrast, the unlimited time for "validating" the notice of appeal results in complete uncertainty as to finality. It could be months or even years before a prospective appellant moved to show excusable neglect. The successful litigant's only recourse is to move to strike the notice of appeal, another burden on the court and a penalty for the adversary's neglect.

A review is necessary to weigh the importance of these policies and resolve the conflict between circuits.

Review at this time is appropriate to avoid the burdens on the appellate court and the expense the parties which would be involved in the appeal on the merits. The district court's order clearly indicates that on remand the court will find that the late filing resulted from excusable neglect. The question of the interpretation of Rule 4(a) is presented clearly and is ripe for decision now.

CONCLUSION

The court below has decided an important question of federal procedural law, interpreting a rule promulgated by this Court, in a manner in conflict with the Court of Appeals for the Eighth Circuit. The petition for a writ of certiorari should be granted.

Dated: September 15, 1976

Respectfully submitted,

JAMES W. ROSENQUIST
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Of Counsel:

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(Appendices Follow)

Appendix A

United States Court of Appeals
Ninth Circuit

Filed—Jul 1 1976
Emil E. Melfi, Jr. Clerk, U.S. Court of Appeals

Rose M. Salazar, Appellant, v. San Francisco Bay Area Rapid Transit District, Appellee.	No. 75-2561

OPINION

Appeal from the United States District Court
Northern District of California

Before: KILKENNY and TRASK, Circuit Judges, and CARR,* District Judge.

KILKENNY, Circuit Judge:

This is an appeal from an order of the district court denying appellant's motion under Rule 40 (a), FRAP, for additional time in which to file a notice of appeal.

FACTS

There is no material dispute in the facts. Appellant filed a Title VII action against the Bay Area Rapid Transit District (Bart) alleging job discrimination on the basis of sex

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*The Honorable Charles H. Carr, Senior United States District Judge for the Central District of California, sitting by designation. Judge Carr, a member of the division, became ill just prior to argument and died March 13, 1976.

and national origin. On January 24, 1975, after trial, judgment was entered against appellant. On March 4th, the district court permitted appellant's counsel to withdraw as attorney. He later filed an affidavit stating that he had prepared and delivered to appellant for her use a notice of appeal *in propria persona*. Appellant did not file this notice until March 21, 1975—some fifty-six days after entry of the judgment. The *motion* to extend the time for filing the notice of appeal for an additional thirty days was not filed until May 1, 1975 some ninety-seven days after entry of the judgment.

Although the district court found that the delay in filing the notice was due to economic hardship and that this was a showing of excusable neglect, it held it had no jurisdiction to proceed under Rule 4(a), FRAP, and on May 19, 1975, denied the appellant's motion for additional time in which to file the notice of appeal.

ISSUE

Did the district court, having held that there was a showing of excusable neglect, have jurisdiction to grant the motion for an extension of time?

DISCUSSION

On May 29, 1975, following the entry of the mentioned order, the United States District Court for the District of Arizona decided *Karstetter v. Cardwell,* 399 F. Supp. 1298. On facts almost identical to those before us, it entertained jurisdiction to enter a *nunc pro tunc* order approving the late filing of a notice of appeal, even though the motion to permit the filing was not itself filed until after the expiration of the sixty day period mentioned in Rule 4, FRAP. On appeal to this court in *Karstetter v. Cardwell,* 526 F.2d 1144 (1975), we disposed of the jurisdictional issue as follows: "Having considered the State's contentions regarding the timeliness of the appeal, we conclude it is properly before us; we deny the motion to dismiss and turn to the merits." *Id.* at 1144. Strange as it may seem, this language, bearing no meaning of its own, has, without fanfare, declared the law of the circuit. The Karstetter court could not have spoken on the merits, as it did, without first holding that the district court had jurisdiction under the order permitting the late filing of the notice of appeal.

For a variety of reasons, a number of other circuits would seem to support the *Karstetter* approach. *See, Stirling v. Chemical Bank,* 511 F.2d 1030, 1032 (CA2 1975); *Alley v. Dodge Hotel,* 501 F.2d 880, 886 (D.C. Cir. 1974); *Cramer v. Wise,* 494 F.2d 1185, 1186 (CA5 1974); *Torockio v. Chamberlain Mfg. Co.,* 456 F.2d 1084, 1086-1087 (CA3 1972); *Reed v. People of the State of Michigan,* 398 F.2d 800, 801 (CA6 1968). At least two circuits have left the question open on similar facts. *See, Brainerd v. Beal,* 498 F.2d 901, 903, n. 3 (CA7 1974); *Pasquale v. Finch,* 418 F.2d 627, 629, n. 1 (CA1 1969). Supporting the opposite view that there is no jurisdiction is *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach,* 525 F.2d 1179, 1183 (CA8 1975).

With great reluctance we bow to the hidden result in *Karstetter* and withdraw our opinion dated April 22, 1976. We hold that the district court had jurisdiction to allow the motion.

The judgment of the district court is vacated and the cause is remanded for further proceedings.

IT IS SO ORDERED.

Appendix B

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Filed May 19 1975
William L. Whittaker, Clerk

United States District Court
Northern District of California

Rose M. Salazar, Plaintiff/Appellant, v. San Francisco Bay Area Rapid Transit District, Defendant/Appellee.	No. C-73-0188 LHB

ORDER

Plaintiff's motion for an order extending time for filing a notice of appeal came regularly on for noticed hearing, pursuant to stipulation of counsel, on May 9, 1975. Both parties were represented by counsel. Counsel having made argument and the Court having given due weight to memoranda and affidavits submitted prior to the hearing, the Court finds:

That FRAP Rule 4(a) precludes the Court from extending the time for filing a notice of appeal for an additional

30 days after final judgment when, as in this case, although the notice of appeal was filed within the second 30-day period, the motion to extend the time for filing was filed more than 60 days after entry of judgment.

It is further found that the plaintiff/appellant's delay in filing the notice of appeal was attributable to economic hardship and that, on that basis only, there is sufficient ground for a finding of excusable neglect.

THEREFORE, IT IS ORDERED that plaintiff/appellant's motion to extend time for filing notice of appeal an additional 30 days beyond the date of entry of final judgment, thereby validating the previously-filed notice of appeal, is denied for the reasons stated herein.

DATED: May 16, 1975

Lloyd H. Burke, Judge of
the United States District
Court

Appendix C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Filed Aug 17 1976
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

Rose M. Salazar, Appellant, v. San Francisco Bay Area Rapid Transit District, Appellee.	No. 75-2561

ORDER

Appeal from the United States District Court
Northern District of California

BEFORE: KILKENNY and TRASK, Circuit Judges, and CARR,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Circuit Judge Trask has voted to reject the suggestion a rehearing in banc. Circuit

*The Honorable Charles H. Carr, Senior United States District Judge for the Central District of California, sitting by designation.
Judge Carr, a member of the panel, became ill just prior to argument and died March 13, 1976.

Judge Kilkenny has voted to recommend a rejection of the suggestion for a rehearing in banc. The full court has been advised of the suggestion for an in banc hearing and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appendix D

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4.

APPEAL AS OF RIGHT—WHEN TAKEN

(a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4)

denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

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